Central Law Journal.

ST. LOUIS, MO., APRIL 24, 1914.

SUGGESTION OF RESORT TO ARBITRATION STATUTES FOR SETTLEMENT OF LEGAL CONTROVERSIES.

It is a far cry for the reform of a judicial system which offers so much in the way of delay and of chance to selfishness and greed to abolish it by the mutual agreements of litigants. And this is what the St. Louis Bar Association proposes in a resolution it has lately adopted.

Speaking of this purpose, the Association said in the second of its resolutions on this subject: "Resolved that the president be, and he is hereby requested, to appoint a committee of five to report on a plan for popularizing this method of the trial of civil cases among members of the bar and among our citizens generally, to the end that the expense, inconvenience, delays and technicalities of procedure in the state courts be avoided, that the courts of our state relieved of the mass of litigation now almost overwhelming them, and that a more friendly and fundamentally democratic method for the adjustment of differences between citizens be promoted." The altruism that breathes through this resolution seems too rare for any other use than to thrill hearers at a banquet, but as persuading contending parties in a contest before the courts to relinquish any supposed advantages they may have or think they have it would fall on unsympathetic ears.

We are moving constantly in another direction with every facility that the law provides in the way of postponing the end of a controversy in the courts. Now it has reached the point that there is little of anything that a defendant able to fight may not do, so as to discount the present worth of any claim against him from fifty to seventy-five per cent of its face value.

The injustice of this situation is manifest, but how futile it seems to propose to those who reap benefit therefrom that they shall meet honest claimants against them half way in its riddance. On the contrary the evidence is abundant everywhere that it is capitalized and the most prolific source of dividends.

Recently we noticed through the public press, that in a New York fire occurring some two years ago, in which many lives were lost, an indemnity company made a settlement at the rate of $75 for each victim. Place a record of this kind against altruism and which will survive?

Our St. Louis brethren may be able to formulate some plan for popularizing the submission of controversies to arbitration, but they should start out with the idea that a lawsuit is a fight and one adversary will yield nothing to the other, unless it is to his advantage so to do. If one side wishes expedition, the other most probably wishes delay, and if one side wishes to avoid inconvenience and expense, these are utilized by the other as a basis for a ruinous compromise. The lawsuit may not come to the lawyer until the parties have failed to reach an agreement. Then the plaintiff, whether he recovers early or recovers late, or may not recover at all, is in a hurry. Then, too, the defendant, whether he is to win or lose finally, is inclined to put off the decision. There is no argument for an early decision that strikes both sides alike.

How few are the cases in which merely honest differences of opinion cause a lawsuit? These are arranged between the parties and our brothers are mistaken in supposing that the public need enlightenment on their right to do this.

But there is an evil and we are not left to appeal to dispositions which take advantage of it to rid ourselves of it. We need expedition and certainty in getting litigated questions to an end. If one knows that a case brought against him is going to be brought to a conclusion in three months, he will find it to his interest to inquire seriously whether he is in the right or the wrong before he allows it to be brought.

Where the first trial may not be for six months or a year or two years and then makes but a step on the road to final liability, he does not have to ask himself whether he is right or wrong in the first instance. There is abundant time for such an inquiry.

A decision upon a question of fact settles nothing intrinsically. It is a mere result pounded out often by superior generalship, but whatever it is when you get it you should abide by it. There is nothing in business or in sport like it. In business to decide is to act and then the event is history. In sport there is one trial and that is an end of the matter. But in a lawsuit there must be an appeal and possibly a new trial and another appeal. Take away all appeals, and thus apply to lawsuits the principle we apply in ordinary business. Two or more trials settle nothing but a controversy between two parties who are consuming the public's time. When they are allowed to consume an inordinate amount, the public merely gives to the litigious a weapon whereby he drives hard bargains with those who have claims against him.

How often do we not see opinions rendered by appellate courts that on questions of fact the jury are the judges, but they send a case back for a new trial on an error of law. These errors of law do not grow fewer in number by multiplied rulings in appellate courts. Therefore we get to no end of things. We are working in a circle and it seems to us that when we resort to or are brought into a court the only way to equalize matters between the parties is to allow one trial to settle the controversy finally. If a lawsuit is for justice sake, the sooner it is ended the less burden it places on parties by whom it is brought or defended, and if brought or defended for other purposes a true sportsmanship requires it to be ended speedily.

This being an essentially practical age, it should see to it that a claim by one merchant against another should, if possible, be a business liability, which it is not if it can be staved off by litigation indefinitely. And it is the same as to any claim for any personal injury caused by a business. The old theory of a tort in business should disappear. A claim of this nature against a business should be like an open account for supplies, that is to say, something in the way of an expected liability in business.

Appeal is a creature of the statute and conditions should be placed upon the public granting it to a litigant. In Missouri there is a statute for exceptional cases going up on appeal, if a judge of an appellate court shall find that substantial justice has not been done. Make this the general rule instead of for exceptional cases. The public owes no more than one trial to a litigant and when the absolute right of appeal is abused or held over others *in terrorem*, it is time it were taken away.

NOTES OF IMPORTANT DECISIONS.

FEDERAL EMPLOYERS' LIABILITY ACT —RIGHT OF ACTION IN PERSONAL REPRESENTATIVE.—In Anderson v. Louisville & N. R. Co., 210 Fed. 689, it was held by Sixth Circuit Court of Appeals, that either a domiciliary or an ancillary administrator could bring suit for death of deceased, this ruling reversing the trial court as to right of ancillary administrator.

The theory of the lower court was that Congress could not have intended that "a concurrent right of action should be vested" in each of a number of personal representatives, "with the multiplicity of actions and endless confusion that would result therefrom."

The Court of Appeals said there was nothing in the act of Congress "which explicity clothes the domiciliary administrator with the exclusive right to maintain such an action, and it is by no means certain that such a restriction might not, simply through inability to obtain service of process upon the negligent employer at the last domicile of the deceased, cause greater inconveniences and hardship than could arise through distinct appointment of another administrator elsewhere and his prosecution of the suit."

This act of Congress meant to give a right of action by a "personal representative" where-

ever suit might be brought. An administrator cannot sue outside of his state. To allow an action by a domiciliary administrator only, you must, in order to give, of a certainty, the right to sue, clothe him with some right under the act of Congress which he does not have under a law of his own state not recognized extraterritorially. Congress was not considering the residence of intestates in vesting right of action in their personal representatives and therefore must be thought to have included whomsoever in that description the words would cover. An ancillary administrator is as much a personal representative as is a domiciliary administrator.

PUNITIVE DAMAGES — RATIFICATION BY REFUSAL TO DISCHARGE AN EMPLOYE.—In Virginia where the rule is that a corporation or any other principal cannot be held liable in punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent, the court goes further and holds that mere failure to discharge said agent does not operate as a ratification of his wrongful act. Southern Ry. Co. v. Grubbs, 80 S. E. 749.

It quotes approvingly the following from Toledo R. Co. v. Gordon, 143 Fed. 95, 74 C. C. A. 289: "It would indeed be a harsh rule—harsh in its effect on all employes—that would hold a railroad company to have ratified the employees' act merely because before the trial the employe was not discharged. Such a rule would put their continued employment in jeopardy every time an accident occurred, not because the employe was shown to have been guilty of wanton conduct, but because the railway company stood in danger that wantonness might be established." See also Everingham v. Railroad, Iowa, 127 N. W. 1009; Grattan v. Snedmeyer, Mo. App., 129 S. W. 1038.

CRIMINAL LAW—RIGHT TO APPEAL FROM PLEA OF NOLO CONTENDERE.—It was said in Sixth Circuit Court of Appeals that the plea of *nolo contendere* "is, in some respects, in the nature of a compromise between the state and the defendant, and that the latter may not have all the advantage of exception and review that could be saved to him by plea of not guilty or by standing suit; but it does not follow that the defendant, in such case, cannot prosecute error at all. In the instant case, the controlling question is not one of niceties in pleading or refinement in construction or application, it is the broad general question of whether the acts described do or do not constitute an offense against the criminal law." Hocking Valley R. Co. v. U. S., 210 Fed. 735.

The court then goes on to show that even under a plea of guilty a reviewing court will determine whether or not an offense has been charged.

All of this may be true, but we doubt whether review may be had directly from the plea, but rather from ruling on some motion in arrest of judgment. At all events, however, we seem here to discover that this plea may be like a general demurrer and appeal taken on that.

KILLING BY INFLUENCE ON THE MIND ALONE.

It is some two or three decades since the British Parliament appointed a commission to revise and codify the criminal law. The commissioners completed their work and reported to parliament; but for some reason the proposed code was rejected, and it would now be of little practical interest to lawyers were it not that the code rejected by the British Parliament was adopted by the Parliament of Canada. 55, 56 Vic. Ch. 29. What discussion or critical examination it may have received while passing through the Canadian Houses of Parliament, or on what grounds it was rejected by the British Parliament, do not appear. But noxious provisions, like noxious persons, are sometimes overlooked, and the latter, as a great poet has said, creep and intrude and climb into that fatal and perfidious bark, built in the eclipse and rigged with curses dark. Without venturing to hope that the Canadian Parliament will receive its meed of curses, and without implying that its criminal law was built in the eclipse, but on the contrary, as a reminder that no temple of justice, or legal edifice of any kind is ever complete and that the only means by which it can be kept from dilapidation and decay, is to make the process of building and tearing down continuous, I venture to call attention to the following remarkable provision:

"No one is criminally responsible for the killing of another, by any influence on

the mind alone, nor for the killing of another by any disorder or disease arising from such influence save in either case by wilfully frightening a child or sick person." Sec. 223, 55, 56 Vic. Ch. 29.

This provision is remarkable in several ways: First—As an express provision for immunity to any person who may deliberately kill another "by any influence on the mind alone," it is remarkably clear and unambiguous. Second—It is remarkable in assuming that for one person to kill another, "by any influence on the mind alone," is possible. Third—It is remarkable in exempting from criminal liability a person who may do that which it is impossible for any person to do. Fourth—It is remarkable as affording evidence that the legislature of a supposedly civilized land, has overlooked the fact that although it is impossible for one person or for many persons to kill another "by any influence on the mind alone," yet for a legislature seriously to adopt a provision that assumes the possibility of such killing and purports to grant immunity to those who may be guilty of it, may be quite as demoralizing as it would be were killing "by any influence on the mind alone," in fact possible. Fifth—It is remarkable as affording evidence that a provision so devilishly demoralizing, may have been adopted inadvertently by parliament, and published in various annotated copies of the code, without having been examined critically by any person who has thought it worth while to call public attention to it.

To those who still hate murder in all its forms it will be somewhat consoling to know that a literal and proper construction of the act would render it incapable of being made a justification of murder or a bar to prosecution for murder in a court of law. In other words, properly construed, it will be a mere nullity, as granting immunity for the doing of that which it is impossible to do. To most lawyers this will be obvious enough, but it must also be remembered, that although a mere nullity in law it may be very demoralizing in fact, unless it is generally understood that it merely purports to provide immunity for the doing of that which it is impossible to do, the explanation of the anomaly being that the drafters of the code intended it as a joke, and that it was overlooked by the Dominion Parliament. But whatever the facts with regard to the history of the act may be, it is a fact of physical science that external influences which produce fright or other emotions act on the body and their effect on the mind is always and necessarily subsequent to their action on the body. By those who have no knowledge of the technology of physical science, this will be more readily comprehended if technical terms are dispensed with. But for the sake of the authority and influence of men eminent in physiological and mental science a quotation from one of the greatest of those may be desirable:

Fright, under the conditions ordinarily prevailing, is most frequently produced by sights and sounds, although doubtless it often arises through impressions received through any of the senses. Of the colors and forms which one sees, however, very few give rise to the feelings of fright. But Professor Huxley tells us that the scarcely perceptible feeling which the mere sight of familiar colors produces arises through the action of bodily organs combined with the vibrations of light. He tells us that this is true of the faint feeling involved in the perception of redness. "Take," he says, "the simplest possible example, the feeling of redness. Physical science tells us that it commonly arises as a consequence of molecular changes propagated from the eye to certain parts of the substance of the brain, when vibrations of the luminiferous ether fall upon the retina. Article Popular Science Monthly, Vol. 30, p. 493. The vulgar may not understand the

terms "the retina," "the luminiferous ether," or "molecular changes," but they know that a red rag often produces very marked effects upon a bull. But they know also that if he has his eyes shut or his back turned so that he cannot see the red rag it will not be likely to produce any effect upon his mental (or will we say bovine calmness. Even the ordinary mind then will understand that the feelings which redness produces are only produced when the eyes are open and turned towards the red object. They can under stand Professor Huxley's language when it is translated into their own language. They fully understand that that faint and almost imperceptible feeling of redness does not arise until that bodily organ called the eye has been acted on. They know too that the bull's eye is not his mind, and they therefore fully understand that a "bodily organ," is not the mind. They know, too, that if they shoot a bull in the eye, with a lead bullet, they are not shooting his mind, but his body, and they can come to comprehend that if they shoot him in the eye with a vibration of light, they do not shoot his mind, but that particular part of his body, and that particular organ of his body called "the eye." If, as a small boy sometimes does, they use a looking glass and shoot him with a whole sunbeam, they will still understand that they are not shooting his mind but his body. And so although they may not understand the difference between an atom, a molecule and a sunbeam, they will very easily receive the impression that an atom is a very small thing, that a molecule is also a very small thing, and that molecular changes are very slight changes, but the fact that they are slight changes does not enable them to act "upon the mind alone."

Looking at the matter in this concrete way it becomes very simple. The most ignorant will understand that if he wants to influence the mind of another he must approach him through one or more of his senses. He can't separate the mind of his victim from his body and pour sweet influence upon it in some Elysium, where the body will not intrude. There may be telegraphic messages which shoot from soul to soul, but before they reach the soul they have to pass through the familiar if not dull channels of the eye. The channels familiar to the vulgar are comparatively few—there are black eyes, blue eyes, brown eyes and grey eyes, but although all these may "reign influence and judge the prize," none of them have the power of disembodying either mind or soul. There are love-lit eyes, scornful eyes and the evil eye—but neither ecstatic joy, nor demoniacal possession has enabled the spirit to take its flight unencumbered by the dull weight of the body and receive from

> "Beings brightly,
> A shaft of light,
> To slay the body
> Without blight."

No! even Lazarus was called from the grave with mind and body inconveniently knit together in spite of love's influence and that of a Power which even electricity could not rival. It is true that Jesus is reported to have suddenly stood in the midst of his disciples, and to have vanished from them, and there are like reports concerning thousands of ghosts; but none of them are reported to have laid the body gently aside without injury or "criminal liability." The nearest approach to an achievement of this kind is that of the two who were possessed of devils (a tenancy in common which was by no means rare in those days, nor in the days when Daniel Dafoe wrote his history of the devil, nor even in days which are much nearer to our own time). The devilish spirits of these two were separated from their bodies and suffered to go into a herd of swine. The bodies of the two it seems were uninjured by the separation, but we may infer that

death came to the pigs, but not through "any influence exerted on their minds alone," but through the very material medium of water. For we are told that they violently ran down a steep place and perished in the sea.

Professor Huxley had undoubtedly a very just and proper appreciation for "the spirit deeply dawning in the dark of hazel eyes," but even he would not have ventured to have separated the spirit or even to have attempted to do so experimentally for the sake of any hypothetically possible ethereal influence upon it that might result in a temporary death to the body without criminal liability. In imagination, he could accompany the spirit, the mind, or the soul in any etherealization which poet, sculptor or painter might suggest, but he was not equal to the materialistic separations of myth-mongers. Poetic and religious feelings were to him facts quite as obvious as the more prosaic facts of the material sciences with which his name is more closely associated. But religious feelings, poetic feelings, all phenomena of mind, while the subject matter of mental science, a science very clearly distinguished from any physical science, were nevertheless recognized by him and by every other man of science worthy of the name, as inseparably related to the physical processes of the body. He would not have attempted to find religious or poetic feeling with a microscope, much less would he have attempted to analyze these feelings with the aid of microscope or any of the instruments of precision known to science. He recognized them as quite as much beyond the reach of electricity as beyond the reach of the scalpel or surgeon's knife. They were only to be analyzed with the instruments which nature herself supplied to him, with his discriminating judgment, his imagination, his reason, with those instruments which are themselves part of the phenomena of mind, but which can be examined very critically, and recognized as composed of a vast number of distinguishable feelings, and many distinguishable powers, by the use not of microscope or of microphone, but of what John Locke called the eye of the soul. But while Professor Huxley recognized the fact that the mind must be its own dissector, he also recognized that in every act of dissection it is accompanied by an appropriate organic action which might be detected and labelled with the aid of the best modern scientific appliances.

Professor Huxley also recognized that the eye of the soul, the ego, is in a vast multitude of cases the initiator of organic as well as of mechanical action; but whether in these cases, the changes in consciousness are preceded or followed by the organic changes he does not seem to have informed us. Of course, the changes in consciousness precede those mechanical actions which are properly called volitional actions, but it is not so easy to decide whether the organic actions of the brain which are involved in thinking precede the act of consciousness involved in thinking. But whether the organic actions precede or follow the acts of consciousness, it is always the organic action which produces death. If it were possible then for the individual by mere acts of consciousness to cause his own death, it would be by causing organic action, that is to say by influence upon his body, and not merely upon his mind.

Of discussions upon Mind and Body relevant to this subject, I know of none more interesting or more valuable than an Essay by Prof. Alexander Bain, published in Volume No. 20 of The Humboldt Scientific Series.

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Toronto, Can.

NEGLIGENCE—MANUFACTURERS.

MAC PHERSON v. BUICK MOTOR CO.

Supreme Court, Appellate Division, Third Department. January 7, 1914.

145 N. Y. Supp. 462.

Where a manufacturer of automobiles made no examination of wheels purchased from a reputable dealer other than to give the machine a road test, it was guilty of negligence; it being obvious that a defective wheel might cause serious injuries, and that the defects might, by a proper inspection, be discovered.

JOHN M. KELLOGG, J. Upon the first trial of this case a non-suit was granted. We reversed the judgment entered thereon in 153 App. Div. 474, 138 N. Y. Supp. 224, holding in substance that there was a question of fact for the jury.

The plaintiff claimed that he and two others were riding in the automobile, upon a good road, at a speed of about eight miles per hour, when the spokes in the left rear wheel broke and the wheel collapsed, the automobile went into the ditch, and the plaintiff was thrown out and injured. The defendant claimed that the plaintiff was going at the rate of about 30 miles per hour when he struck several inches of loose gravel upon the road, and that the gravel and the high rate of speed caused the automobile to go into the ditch, and the spokes were broken when the wheel collided with a telegraph pole. The verdict of the jury has established the fact that the wheel collapsed under the circumstances claimed by the plaintiff, and that his injury is due entirely to the weak and defective wheel. We cannot say that the verdict is against the evidence.

The automobile was purchased by the plaintiff of Close Bros., of Schenectady, who had purchased it from the defendant, the manufacturer, in 1909. The defendant had bought the wheel from the Imperial Wheel Company, a reputable manufacturer of wheels, whose factory was situated about 100 yards from the defendant's factory. When received by the defendant, the wheel was ironed and was primed with one coat of paint. The defendant made no examination of it when received, except to see that it ran true and that it had not been marred in shipment. The quality of the wood in a spoke may be determined by its appearance, its grain, and its weight. The end of a spoke shows the grain better than the polished surface. The quality of the wood in a wheel can be judged better before than after it is ironed and painted. The priming coat upon the wheel covered the grain and made it difficult to determine the quality of the wood by the eye. The wheels are primed by the manufacturer to keep out the moisture, but whether wheels shall be furnished with the priming coat, or oiled, or in their natural state is left to the determination of the defendant. The defendant had no wood expert, and never examined the wheels when in course of manufacture, or made any examination as to the safety of the wheel before it was put upon the car, but ran the car several miles on a trial test before it was sold, turning sharp curves and giving it severe usage. It had never known a wheel to collapse on account of the poor quality of wood from which it was made. Its attention had never been called to the necessity of making any examination to determine whether the wheels bought by it were safe or not; it assumed that they were safe.

The question for consideration is whether the defendant is responsible to the plaintiff for the injury caused by the defective wheel and whether the exceptions taken at the trial call for a reversal. The trial justice charged the jury in substance that the defendant was not liable unless an automobile equipped with a weak wheel was, to the defendant's knowledge, a dangerous machine, in which case the defendant owed the plaintiff the duty to inspect the wheel and see that it was reasonably safe for the uses intended; that if the machine, in the condition in which it was put upon the market by the defendant, was in itself inherently dangerous, and if the defendant knew that a weak wheel would make it inherently dangerous, then the defendant is chargeable with knowledge of the defects to the extent that they could be discovered by reasonable inspection and testing. Notwithstanding the fact that the wheel was purchased of a reputable manufacturer, the defendant still deemed it necessary to examine it and test it to see that it would run true and that it was not marred in shipment, oherwise the automobile would not be salable. It made no inspection or test as to the safety of the wheel or to discover any defects which might make it dangerous in actual use.

(1) The evidence indicates quite clearly that many other automobile manufacturers, prior to 1909, exercised no greater care as to wheels bought by them than the defendant exercised with reference to its wheels, and that no accident had resulted therefrom. This evidence indicated, not that the defendant was careful, but that the manufacturer had been very lucky. Shannahan v. Empire Engineering Corporation, 204 N. Y. 543, 550, 98 N. E.

9, 44 L. R. A. (N. S.) 1185; Croghan v. Hedden Construction Co., 147 App. Div. 631, 634, 132 N. Y. Supp. 548.

Sometimes an accident happens where human foresight would not expect it. A person is not required to guard against an accident which naturally would happen, or to examine for defects which it would be unreasonable or unusual to expect, and in such cases the practice of others in the same business, and the fact that no accident had occurred under like circumstances, are material. But if the condition is obvious, and it is evident to the ordinary man that danger is to be expected or may exist, the fact that others conduct their business carelessly and have been lucky furnishes no indemnity for the defendant's neglect. An ordinary person knows that the wheels of an automobile must be made of good material, and that a weak and defective wheel is liable to cause serious damage not only to the people using it but to many others. An automobile equipped with weak wheels would be an imminently dangerous machine. A serious accident is not necessary to call these facts to the attention of a casual observer. The manufacturer is fairly chargeable with knowledge of these facts.

In the old days, a farmer who desired to have wheels made for an ox cart would be apt to inspect the timber before it was painted, before the wheel was ironed and the defects covered up, in order that he might know what he was buying. He would realize that the oxen, in case of an accident or fright, as he would say, "might go pretty fast," and that if a wheel broke serious damage might occur to him or to others. He would know that a painted wheel, fully ironed, rendered it more difficult for him to form a good judgment as to the quality or kind of wood used. An ordinary man, in buying a pitchfork, a golf club, an axe helve, or an oar for a boat, will look at the timber, "heft it," and otherwise endeavor to ascertain whether it is made of suitable material. He is not satisfied with the fact that he is buying it of a reputable maker. It is not unreasonable to expect that the manufacturer of an automobile will give some attention at least to the material which enters into a wheel which he has purchased for use thereon.

If the defendant had purchased its wheels unpainted, a wood expert would have been of great assistance in determining the quality of the wood used. If it purchased the wheel painted, some of the paint could have been removed, the wheel could have been weighed, and an expert could have formed some judgment as to the quality of the wood used. There is some evidence of other tests, and it must be there is some way of determining the quality of the wood in such a wheel; if not, it must be negligence to purchase a wheel in such a forward state of construction that it is impossible to determine what it is made of. It is common knowledge that a wagon maker of reasonable experience and care could determine what quality of timber is suitable or unsuitable to put in a wheel and, by examining a wheel before painting, could form a reasonably accurate judgment as to the quality of the wood. All workers in wood examine and throw aside defective material, using only that which, upon examination, proves satisfactory. He is not satisfied with the fact that the material was purchased of a reputable manufacturer. It is not clear that the manufacturer in this case exercised the care which was required under the circumstances, or that the defendant was informed or believed that such care had been exercised. It is clear, however, that the defendant made no reasonable effort to determine as to the safety of the wheels which it used.

(2) Many requests to charge were made and many exceptions were taken, but it is unnecessary to consider them, for when it was properly established that the wheel broke under the circumstances claimed by the plaintiff, and that no examination was made by the defendant as to the safety of the wheel, the liability of the defendant follows. The exceptions relate principally to charges by the court as to what reasonable inspection and care were required; but, if any care was required on the part of the defendant with reference to the safety of the wheel, the verdict is clearly right, when it is considered that the plaintiff's injuries were due to the defective wheel under the circumstances stated. The charge must be taken as a whole, and the jury could not have failed to understand that the defendant was not liable unless it was called upon, by the known dangers which would result from weak wheels, to make some reasonable inspection, or exercise some reasonable care, with reference to the wheels used. No real care being shown, the question as to what care might exempt the defendant from liability is not material. We find, therefore, no exception which calls for a reversal.

We hold that under the circumstances the defendant owed a duty to all purchasers of its automobiles to make a reasonable inspection and test to ascertain whether the wheels purchased and put in use by it were reasonably fit for the purposes for which it used them, and, if it fails to exercise care in that respect, that it is responsible for any defect

which would have been discovered by such reasonable inspection and test.

The judgment and order should therefore be affirmed, with costs.

NOTE.—*Dealer Selling to the Trade an Article Imminently Dangerous.*—The instant case seems to us to regard too much the assembler of parts of a machine as their manufacturer, whereas, if he gets them from a manufacturer he ought to be liable for defects making them imminently dangerous. We submit a few cases having a more or less direct relation to this aspect of the subject.

In a case decided by this same court and by the same department thereof, it was held that a manufacturer of guns was not liable to one in whose hands a gun burst and there was testimony to show there was a defect in the metal of the barrel, where he showed by uncontradicted evidence that he purchased the steel of which the barrel was made from a manufacturer of high reputation, who furnished the same class of metal to other firearms manufacturing companies and who for a long time had furnished the U. S. Government with the same material for that purpose and to 90 per cent of the smaller gun manufacturers of the country. He also showed that before he sent to defendant any metal to be manufactured into guns it was tested to a very high degree for tensile strength and after the gun was made it was tested in actual loading and firing. Favo v. Remington Arms Co., 73 N. Y. Supp. 788, 67 App. Div. 414.

In Boston Women Hose B. & R. Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478, it was held that a machine maker of established reputation who on an order from a manufacturer delivers to him a boiler with a defect obvious upon inspection and which defect caused an explosion was liable to this manufacturer for damages paid by him to his employees. The boiler was furnished for a certain purpose and was considered to be warranted therefor. A query was suggested as to whether the employes could have recovered against the boilermaker, but here the manufacturer conceded his liability in failing to inspect for the obvious defect.

In Peaslee-Gaulbert Co. v. McMath, 148 Ky. 265, 146 S. W. 770, it was said: "A dealer who purchases and sells an article in common and general use in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not. He may take it as he finds it in the market. He is not required to investigate its qualities or endeavor to ascertain whether it is dangerous for the use intended before he can absolve himself from liability in the event injury results from its use." Further along the court says: "The merchant or dealer can only be made responsible in damages to a person who has no contractual relations with him when the article is imminently or inherently dangerous in the ordinary use to which it may be reasonably put *and* when with knowledge of this fact he sells or puts it on the market." May not an assembler of articles in manufacture stand like a merchant or dealer? He is a manufacturer only in a limited sense.

In Clement v. Rommeck, 149 Mich. 595, 113 N. W. 286, 13 L. R. A. (N. S.) 382, 119 Am. St. Rep. 695, a stove polish was sold and suit to recover damages sustained in its use was brought against the manufacturer and dealer and demurrer to the petition by the dealer was sustained. The court said: "It is to be noted that the declaration contains no averment that the defendant, Rammeck, had actual knowledge of the inflammable nature of the goods; nor is it averred in what manner he was negligent in not knowing their inflammable nature. It gets down to this: Whether a dealer—a hardware merchant, for example—who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended is liable in the absence of negligence, if it turn out that the article is not adapted to the use and causes injury. We think it clear upon principle that no such liability exists." For further cases see West v. Emanuel, 198 Pa. 180, 47 Atl. 965, 53 L. R. A. 330; White v. Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 593.

In Bruckell v. Milhan, 102 N. Y. Supp. 395, 116 App. Div. 832, it is ruled that the vendor of an article, not a manufacturer, is not bound to test each article when it is not inherently dangerous. The general principle of the liability of the manufacturer is well stated by Supreme Court of Tennessee in Burkett v. Studebaker Bros. Mfg. Co., 150 S. W. 421, not wholly unlike the case at bar. There the plaintiff bought a carriage from a dealer, and the manufacturer was sued. There was a defective wheel which gave way and causing the carriage to overturn plaintiff was seriously injured. The court held the manufacturer not liable because the article was not imminently dangerous, so as to make him liable to a third party with whom he had no contractural relations. If a defective carriage wheel is not imminently dangerous, how can a defective automobile wheel be said to be?

In Johnson v. Cadillac Motor Car Co., 194 Fed. 497, the defendant manufacturer assembled parts in a car manufactured by other people. In this case injury ensued from a front wheel collapsing by reason of one or more defective spokes therein. One of the questions submitted to the jury was: "Did the Cadillac Company use or exercise due and proper care in purchasing its wheels of the Schwartz Company and finishing and putting same on its automobiles and giving them the test it did and then putting its automobiles on the market?" The jury answered "no." But it was said, also, the jury expressly negatived knowledge of the defective material used in the construction of the car. Also the court charged the jury that the automobile company if it purchased from a manufacturer of recognized standing and reputation these wheels, it was justified in assuming that proper care had been observed and proper tests made, but it also is obligatory upon it to subject the wheels to ordinary tests for determining their strength and efficiency. It was under no duty to cut into or bore into or take to pieces these wheels. The verdict was set aside as being opposed to the special findings.

This case seems very apt indeed. The assembler occupies in it a sort of middle position between an ordinary dealer and a manufacturer, and the tests he is bound to make are not such as to make reputation of the manufac-

turer behind him count for nothing. This case resembles somewhat Favo v. Remington Arms Co. and decides the question the same way.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION, COMMITTEE ON PROFESSIONAL ETHICS.*

In answering questions this committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:

"This committee shall be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time."

It is understood that this committee acts on specific questions submitted *ex parte*, and in its answers bases its opinion on such facts only as are set forth in the question.

QUESTION NO. 47.

A list of questions submitted to the Committee on Professional Ethics by the sub-committee appointed at the conference of the

(a) Committee on Professional Ethics,

(b) Committee on Unlawful Practice of the Law,

(c) A Special Committee of Lawyers organized to aid in elevating the professional standards of the practice of commercial law. The several specific interrogatories appear below immediately preceding the answers thereto.

PREAMBLE TO ANSWER NO. 47.

In answering this series of questions the committee is guided by its view that the practice of the law is a profession and not a trade or a business; therefore some methods which are unobjectionable in a trade or business may still be open to criticism in an attorney because they detract from the objects for which his profession exists. It is a profession, not only because of the preparation and qualifications which are required in fact and by law for its exercise, but also for the primary reason that its functions relate to the administration of justice, and to the performance of an office erected and permitted to exist for the public good, and not primarily for the private advantage of the officer. Such private advantage, therefore, can never properly be permitted to defeat the object for which the attorney's office exists as a part of the larger plan of public justice.

With these considerations firmly in mind the committee expresses its opinion in answer to the specific inquiries, as follows:

I.

(a) May A. B., a lawyer, conduct either in his own name or under some trade name or title a collection business, the following being assumed as the method of doing business:—Advertisements or cards are inserted in publications, and *letters sent to merchants, in which it is stated that the concern is engaged in a general collection business and solicits accounts for collection; solicitors are employed to visit merchants to solicit their collection business;* the clerks employed in the business are paid fixed salaries; all of the profits go to the attorney; and the latter attends to professional matters arising out of the business within his own territory; the concern sending to other attorneys practicing therein such matters as arise outside of A. B.'s territory.

ANSWER.

No. This plan unites the practice of a profession with the conduct of a business which involves the solicitation of professional employment; the essential dignity of the profession requires that general solicitation of professional employment should be avoided.

(b) Does it make any difference in the answer if the matter underscored in the previous question is omitted from the hypothetical case?

ANSWER.

Yes. There is no reason why the lawyer may not make a specialty of collections as a part of his professional activities; he should not however cloak his identity under a trade name or title; he should practice his profession either in his own name, or in association with some other lawyer or lawyers whose names may be used to identify the association. If his announcements are inserted in publications, they should conform to the provisions of Canon 27 of the American Bar Association, approved by the New York State Bar Association: that is, they should consist of a simple professional card, and he should not in any other way generally solicit professional employment.

II.

E. F., a collection agency, receives a claim for collection. Following failure to collect

*Previous decisions reported in 78 Cent. L. J. 75; 77 Cent. L. J. 465. This decision on question 47 on methods of securing legal business should interest every lawyer.

without suit, it sends the claim to A. B. an attorney who performs legal services in connection therewith.

(a) May A. B. divide his fee with E. F.?

ANSWER.

No. The division of professional fees with those not in profession detracts from the essential dignity of the practitioner and his profession; and admits to its emoluments those who cannot lawfully perform its duties. If the legal services involve the bringing of suit, such a division appears to be prohibited by our Penal Law. (See S. 274.)

(b) May A. B. receive a salary from E. F., E. F. charging its patron for the entire service inclusive of the professional service, A. B. making no charge direct to the patron?

ANSWER.

No. A lawyer may receive a salary from a collection agency for services rendered to that agency, but if the lawyer render professional services to the patron of the agency the lawyer should make his charge directly to the patron, otherwise the agency would be determining the charge to be made for the lawyer's services and would be sharing in the lawyer's fee or making a profit on the lawyer's professional work.

(c) May A. B. charge for his own service a specific sum, which he retains wholly for himself, E. F. charging for its own service a specific sum which it retains wholly for itself, E. F. guaranteeing its patrons the faithful discharge of the duties of A. B., including payment over of all collections by A. B. for the patron?

ANSWER.

The method of charging is unobjectionable, but it is derogatory to the essential dignity of the profession for a lawyer under such circumstances to permit another to guarantee expressly his honesty or efficiency.

(d) Does it alter the situation that all legal matters coming through E. F. are referred to A. B. within his territory?

ANSWER.

No.

III.

(a) May A. B. take a retainer from G. H., an organization of business men, to perform such legal services as G. H. may require as its attorney, and also attend to such legal matters as the members of G. H. shall refer to A. B., G. H. urging and soliciting its members to place in A. B.'s hands for reference to A. B. all matters involving collection of accounts, or involving the representation of creditors in bankruptcy proceedings, upon the ground that by co-operation in the handling of the debtor's affairs, members interested will profit?

ANSWER.

We assume, of course, that the lawyer's retainer by the Association leaves him free to follow his own conscience. The Committee sees no impropriety in the course suggested, provided that G. H. is a bona fide organization formed by its members for their own benefit, is not engaged in a regular business of collecting accounts of non-members for profit and it is the actual interest of the organization which prompts its solicitation, and provided the plan is not merely a cover for the solicitation of business by the attorney. The practice of the solicitation of professional employment by a lawyer is to be condemned no matter what device may be resorted to as a cover or cloak: indeed, the adoption by him of a cover or cloak to conceal what if openly done would be professionally improper, merely intensifies the impropriety, for it adds deception to what would otherwise be an undesirable breach of the essential dignity of the office.

(b) May A. B. divide with G. H. such fees in bankruptcy matters referred to him by G. H., as he may receive as attorney, either for petitioning creditors, receiver or trustee?

ANSWER.

No. The Committee's views of the impropriety of such division of professional fees are expressed in answer II (a) above.

(c) May A. B. pay to G. H. in the situation referred to in subdivision (b) above for services rendered to him by G. H.?

ANSWER.

The vice of such a payment for services is the temptation to make it a cloak for compensation for the solicitation of business for A. B., or a cloak for an unequal preference to the members of G. H. We would see no impropriety in a reasonable compensation to the association for services actually rendered if these two dangers were clearly eliminated in a particular case and the amount and mode of the payment were fully disclosed in the proceeding or settlement.

(d) May G. H. in matters in which it desires the co-operation of creditors, not members of G. H., circularize such creditors, urging them to place their claims with G. H. or A. B. in order that A. B. may conduct such legal proceedings as may be necessary, it being assumed that it is for the best interests of

creditors that such proceedings should be conducted?

ANSWER.

Upon the assumption that G. H. does this not for the purpose of engaging in a general practice, but solely in the special case for the purpose of protecting the interests of its members, it may be done; the Committee believes it would be preferable to have the proxies run to G. H. or an officer; if it be a device to enable A. B. to do indirectly what he could not properly do directly, it is to be condemned.

(e) Does it make any difference in the above situation whether A. B. performs the service for such non-members gratuitously or not?

ANSWER.

If the interest of G. H. demands or justifies gratuitous services for non-members, or any other good reason in the opinion of A. B. so demands or justifies it, he is not required to charge for his services; but if it is a mere device to secure non-members as clients in other employment, it becomes a reward offered for employment, and therefore is to be condemned for reasons already assigned.

IV.

(a) May E. F., an existing collection agency, where the co-operation of creditors other than regular patrons or subscribers of E. F. seems desirable, circularize such creditors, urging them to place their claims with E. F. or A. B. in order that A. B. may conduct such legal proceedings as may be necessary, it being assumed that it is for the best interests of creditors that such proceedings should be conducted?

ANSWER.

It may be that the act of E. F. is the unlawful practice of law within the scope and reasoning of Matter of Co-operative Law Co., 198 N. Y. 479, Matter of Associated Lawyers Co., 134 A. D. 350, and Matter of the City of New York, 144 A. D. 107. The Committee expresses no opinion upon this question of law. If E. F.'s act be unlawful, the lawyer should not participate in any emolument resulting therefrom; but if it be lawful for E. F. to circularize creditors, "in order that A. B. may conduct legal proceedings," still it is unprofessional for A. B. to permit such solicitation of professional employment for him by E. F., since he cannot properly so solicit it for himself.

(b) May A. B. divide with E. F. such fees in bankruptcy matters referred to him by E. F, as he may receive as attorney either for petitioning creditors, receiver or trustee?

ANSWER.

No: for the reasons already stated in II (a).

(c) May A. B. pay to E. F. in the situation referred to in IV (a) above for services rendered to him by E. F.?

ANSWER.

No: in view of our answer to IV (a).

(d) Does it make any difference in the situation referred to in IV (a) above whether A. B. performs gratuitously or not the service for such creditors who are not regular patrons to E. F.?

ANSWER.

No.

V.

(a) May A. B., an attorney representing some clients, creditors in XYZ, a bankruptcy proceeding, send a general circular letter to all creditors, informing them of his representation of some creditors, and urging them to place their claims and proxies in his hands, for the reason that co-operation is in the best interests of the estate?

ANSWER.

No. The co-operation which is desired among creditors to prevent fraud or to secure an efficient administration is the concern of the clients, as to which the lawyer may properly advise them; but he should avoid doing directly or indirectly anything that savors of such solicitation of employment.

(b) May he do this, if the circular letter instead of dealing generally, asks that such claim be placed in his hands if the creditor is not otherwise represented?

ANSWER.

No. This does not eliminate the objectionable element of solicitation.

(c) May he do either (a) or (b) if his sole motive is to insure the complete protection of his immediate clients' interests?

ANSWER.

No. His motive is immaterial; as his client's interests demand protection, the client or some other agent of the client may seek the co-operation always provided it is not a mere device to solicit employment for the attorney.

VI.

(a) May A. B., an attorney, receive claims or proxies where such claims or proxies have been secured through circularization by a creditors' committee formed in XYZ a bankruptcy proceeding?

ANSWER.

We see no impropriety in the action suggested, provided the Committee is not a cloak used by A. B. to procure employment.

(b) Does it make any difference that A. B.'s clients are the committee?

ANSWER.

No: with the limitations already suggested.

(c) Does it make any difference that A. B. suggested the formation of the comittee?

ANSWER.

No. If the suggestion was in his client's interest, and not a cloak, as already indicated.

(d) Does it make any difference that the proxies run to the members of the creditors' committee as attorneys in fact A. B. appearing as counsel for the committee?

ANSWER.

No. It appears preferable that the proxies should run as suggested because that course seems less liable to abuse as an objectionable cloak to solicitation of employment for the attorney.

VII.

(a) May A. B. receive from C. D., a collection agency, claims in the XYZ bankruptcy proceedings, solicited by C. D., and appear as attorney in such bankruptcy proceedings acting under power of attorney for such claimants?

ANSWER.

Yes. A lawyer should not be debarred from accepting professional employment from a collection agency. We have already indicated the abuses to be avoided, and to which a lawyer should not lend himself. (See answers above to IV (a), (b), (c) and (d).

(b) May A. B. receive from C. D. claims in such bankruptcy proceedings, and appear as attorney for or act under power of attorney for such creditors, C. D. being specifically authorized by the claimant to select an attorney for him, and as his agent notifying A. B. that it delivers the claim acting as such agent?

ANSWER.

In a case not obnoxious to the criticism suggested in IV (a) and (b) above, the relationship between the attorney and client is direct, and therefore we see no impropriety in A. B.'s acceptance of employment by the creditor.

VIII.

(a) Is there any impropriety in an attorney permitting his name to be advertised as attorney or counsel in connection with a corporation's, bank's, trust company's, or re-organization or creditors' committee's announcement of its purposes by advertising in newspapers or circulars or upon its letter-heads?

ANSWER.

No; provided the particular form of advertisement is not otherwise objectionable. It is obvious that the re-organization committee, the corporation, the bank or trust company may depend in part in its appeal for public confidence and business on the standing and reputation of its professional adviser; so also in the case of creditors' committees either in a re-organization plan or in the request for co-operation among creditors, the name of the attorney by whom the proceedings in aid of the creditors will be conducted is often the determining feature in the decision of the creditor as to whether or not he will co-operate. On the assumption, therefore, that the attorney is not the moving party in the advertisement of his name, we think it would be unreasonable to answer this question in the affirmative.

(b) Is there any impropriety in an attorney permitting his name to be announced as attorney or counsel for a trade organization or association upon its stationery?

ANSWER.

No.

(c) Is there any impropriety in A. B., an attorney, permitting a trade organization for which he acts as attorney or counsel to solicit its members to consult A. B. upon such legal matters as require professional service, or to solicit the sending of claims for suit by members of the association to A. B.?

ANSWER.

In general we consider such solicitation improper; where, however, the collective interests of the members of the association require co-operation, it is not improper.

(d) Is there any impropriety in A. B. permitting a collection agency, doing a general collection business including the solicitation of collections but not legal business, to print upon its stationery and in its advertisements "A. B. attorney" or "A. B. counsel"?

ANSWER.

No.

IX

(a) May A. B., a lawyer, having a commercial law practice, pay a fee to M. N. O., a list made up of lawyers and in which collection agencies appear, for the privilege of having his name appear upon such list?

ANSWER.

Yes: provided the form of the announcement is not otherwise objectionable [see I (b)]; provided also that the amount he pays to M. N. O. is not determined by the amount realized by A. B.

(b) Does it make any difference as to its professional propriety, that the list is used exclusively for and by lawyers, or is intended to be circulated also among laymen?

ANSWER.

No.

(c) Does it make any difference as to its professional propriety, that the charge of the list varies according to the amount of business received by the lawyer through such a list?

ANSWER.

Yes: since it necessarily involves a division of the lawyer's professional fees, in consideration of the securing of employment for him by the person with whom he divides his professional fees.

(d) Does it make any difference that the list in connection with its publication or circulation maintains a complaint department at its own expense, adjusting differences arising out of charges earned or claimed, and issues for each representative in the list a surety company bond guaranteeing the faithful performance of his duty?

ANSWER.

Yes. It is derogatory to the essential dignity of the profession for a lawyer to seek employment by offering, or permitting another to offer, a bond to guarantee his honesty or efficiency.

(e) Does it make any difference as to professional propriety, that the list is confined wholly to lawyers, but managed for profit, and restricted in each town to such firms or individuals as are approved by the managers, assuming, also, that the managers in good faith, seek only to put into the list competent and trustworthy lawyers, and make their decision only after careful investigation concerning the lawyer?

ANSWER.

No.

BOOKS RECEIVED

Owen's Law Quizzer. Questions and answers on twenty-seven of the most important legal subjects. Designed especially for the use of Law Students in review work and in preparation for examination for degrees in Law Colleges or for admission to the Bar. Fourth edition. By Wilber A. Owen, LL. M., of the Toledo, Ohio, Bar. Price, $4.00. St. Paul. West Publishing Company. 1914. Review in this issue.

BOOK REVIEWS.

OWEN'S LAW QUIZZER. FOURTH EDITION.

Mr. Wilbur A. Owen, of the Toledo Bar, sends out a book containing questions and answers in twenty-seven of the most important legal subjects, which is designed especially for the use of law students in review work and in preparation for examination for degrees in law colleges or for admission to the bar.

This work has been very widely used and each answer is fortified by citation to some well known text book writer. The book gives answers generally based on the common law, though necessarily there are some subjects like Federal Procedure and the New Equity Rules, that lie outside of the common law. It is a very useful book to refresh the memory of a student and the answers are well chosen for clearness, accuracy and conciseness. The volume is very attractive in appearance and is published by West Publishing Co., St. Paul. 1914.

PRINCIPLES OF CORPORATION LAW. SECOND EDITION.

Prof. Joseph C. France, Lecturer on the Law of Corporations in the University of Maryland, produces a second edition to his treatise on the Principles of Corporation Law of 1903.

This work has been prepared principally for the use of students and while to some extent the work is generally local in its character, yet its treatment is so much along general lines as to make the book of service to practitioners.

The work is upon thick heavy paper, the binding in law buckram and is sent out by M. Curlander, Law Bookseller, Publisher and Importer. Baltimore. 1914.

HUMOR OF THE LAW.

A colored gentleman, on trial for his life in a remote Tennessee town, was asked by the judge if he had anything to say, whereupon he replied:

"All I has to say is this, Judge: If you hangs me, you hangs the best bass singer in Tennessee."—Everybody's Magazine.

"Gentlemen of the jury," said William VanCleave, prosecuting attorney of Macon County, Mo., in his maiden speech on a manslaughter case, "I ask you to consider that old man, Hack, who the defense called in this trial. Hack's shifty eyes darted about everywhere. They looked at the jury, then at the judge, wandered over to the lawyers at the defendant's table, and then he would gaze at the attorneys for the state, but I will leave it to you men that never once did he look at a gentleman!"—The Green Bag.

Recently one of the judges in Chicago was hearing a motion for the increase of alimony. Finally, after the Court had announced its decision to increase the alimony, the opposing attorney became most vehement in his remarks. After listening as long as he could restrain himself, the judge finally exploded with:

"Why, Jesus Christ! Good God Almighty—" then catching himself and looking at the hushed courtroom, he saved himself by ending—"made the sun revolve and days and seasons to come and go; and that is enough change of conditions to warrant the increase where the woman needs it"—The Green Bag.

WEEKLY DIGEST.

Weekly Digest of All the Current Opinions of All the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Amendment.—Where a claim against a bankrupt's estate was originally filed within the year, but was disallowed, and subsequent proceedings showed that it should have been filed for a larger amount, the amendment filed after the year had expired was not barred by the one-year limitation specified by Bankr. Act, § 57n.—In re Hamilton Automobile Co., C C. A., 209 Fed. 596.

2.——Bill of Sale.—Where defendant, having a bill of sale conveying a right to cut timber from certain land, agreed to assign the same to the bankrupt, and delivered the bill of sale to it, such act was sufficient to transfer the title.—Cullen v. Armstrong, U. S. D. C., 209 Fed. 704.

3.——Composition.—The purpose of a composition agreement is the same that of ordinary proceedings in bankruptcy, in that it provides for the pro rata distribution of the bankrupt's assets, and the effect of an order of dismissal by compensation is the same as that of an order of discharge.—Herrington v. Davitt, 145 N. Y. Supp. 452.

4.——Conditional Sale.—A contract of conditional sale of machinery to a bankrupt, duly filed in accordance with Gen. St. Kan. 1909, though within four months prior to bankruptcy, held not a "transfer" by the bankrupt to the claimant, but a retention of title in him and enforceable against the bankrupt's trustee.—Baker Ice Mach. Co. v. Bailey, C. C. A., 209 Fed. 603.

5.——Liquidation.—An agreement between a trustee and a secured creditor as to the value of the latter's security, made while both were parties to a suit in which the question was involved, held a liquidation by litigation, which entitled the creditor to prove the unsecured part of the claim within 60 days.—First Nat. Bank v. Cameron, U. S. C. C. A., 209 Fed. 611.

6.——Pleading.—In view of new equity rule 29 abolishing demurrers, a demurrer will not lie to a petition in involuntary bankruptcy.—In re Jones, U. S. D. C., 209 Fed. 717.

7.——Practice.—A bank will not be allowed to set off a deposit made by a bankrupt shortly prior to the bankruptcy against a previous indebtedness of the bankrupt contrary to the agreement under which the deposit was made.—Farmers' & Merchants' State Bank of Waco, Tex., v. Park, C. C. A., 209 Fed. 613.

8.——Preference.—Creditors who petitioned for review of an order of a referee and obtained its reversal held not entitled to preference over other creditors having precisely similar claims who did not join in the petition.—In re Jamison Bros. & Co., C. C. A., 209 Fed. 541.

9. **Banks and Banking**—Assignment.—The directors of an insolvent bank cannot make a general assignment for creditors, but such deed can only be executed by the stockholders.—Winston v. Gordon, Va., 80 S. E. 756.

10.——Notice.—Where a bank making loans to a mercantile company on assignments of its accounts receivable as collateral appointed the president of the company its agent to collect the accounts and deposit the proceeds, it was bound by his knowledge of the company's insolvency.—In re Cotton Manufacturers' Sales Co., U. S. D. C., 209 Fed. 629.

11. **Bills and Notes**—Bona Fide Purchasers.—A purchaser of notes, with notice of their infirmity from a bona fide holder of them as collateral for a loan acquires such and only such rights therein as his seller had, that is, an interest to the extent of the loan.—Bute v. Williams, Tex., 162 S. W. 989.

12.——Novation.—Where a contract for sale of cotton, apparently legal, was transferred to an innocent transferee for value, and the seller gave a note for damages agreed on in the contract, without disclosing that the contract was illegal, and the maker of the note gave a new note, held, there was a novation which precluded setting up the illegality of the original contract in an action on the note.—Russell v. Turner, Ga., 80 S. E. 731.

13.——Parties.—A holder of indorsed negotiable paper may maintain a suit thereon against the maker, though he is acting as agent or trustee for others.—Loeb v. Weil, C. C. A., 209 Fed. 608.

14.——Pleading.—In an action on a note, want of consideration is not available as a defense unless pleaded.—Sharp v. Sharp, 145 N. Y. Supp. 386.

15. **Brokers**—Fraud.—A real estate broker's failure to communicate a cash offer to his principal according to directions, as the result of which the principal exchanged his land with another, who immediately resold the land to the cash purchaser, held to be a fraud upon the principal, so as to preclude the broker from recovering commissions.—Moore v. Kelley, Tex., 162 S. W. 1034.

16. **Burglary** — House-Breaking.—A showcase or show window which was made into and was a part of a house constituted a part of the "house," so that a breaking thereof and the taking of shoes therefrom was the breaking of a house.—Lewis v. State, Tex., 162 S. W. 866.

17. **Carriers of Goods**—Fraud.—If a contract for the shipment of freight was procured by the carrier by fraud, it was not binding upon the

shipper.—Galveston, H. & S. A. Ry. Co. v. Sparks Tex., 162 S. W. 943.

18. **Carriers of Live Stock**—28-Hour Law.—A terminal railroad company held not to have violated the 28-Hour Law by accepting from a connecting carrier cars of cattle which had already been confined for a longer time than permitted by the statute, and moving them with all reasonable dispatch to the nearest stockyards and there unloading them for rest, feed and water.—St. Louis Merchants' Bridge Terminal Ry. Co. v. United States, C. C. A., 209 Fed. 600.

19. **Carriers of Passengers**—Contributory Negligence.—A passenger on an interurban car extending his hand over the guard rail to flick the ashes from his cigar, so that his hand struck a tree, and broke his wrist, was guilty of contributory negligence as a matter of law.—Malakia v. Rhode Island Co., R. I., 89 Atl. 337.

20.——Ratification.—The failure of a railroad to discharge a conductor, prior to trial, who was charged with assault, in an action for damages, was not a ratification of the assault.—Southern Ry. Co. v. Grubbs, Va., 80 S. E. 749.

21. **Chattel Mortgages**—Subsequent Purchases.—In absence of express provisions to that effect, a mortgage of a stock of goods would not cover other goods subsequently purchased from the trustees of the stock mortgaged, or otherwise.—In re Thompson, Iowa, 145 N. W. 76.

22. **Conspiracy**—Evidence.—In a prosecution for conspiring to obtain property by false pretenses by inducing the purchase of books by false representations, an order for books by prosecuting witness, expense checks given the co-conspirator, and notes given for the books were admissible as evidence of acts accomplished in the common design, though they were not "property" within the indictment.—People v. Warfield, Ill., 103 N. E. 979.

23. **Contempt**—Reasonable Doubt.—A contempt proceeding entitled as such and brought to punish accused for alleged perjury in attempting to qualify himself as surety on bail bond being criminal, accused will be presumed innocent until his guilt is established beyond a reasonable doubt.—Jones v. United States, C. C. A., 209 Fed. 585.

24. **Contracts**—Act of God.—In absence of statute, one who expressly contracts to do a thing is not as a rule excused from performance because it is rendered impossible by an act of God.—Northern Irr. Co. v. Dodd, Tex., 162 S. W. 946.

25.——Concealment.—Intentional concealment of material facts which it is a party's duty to disclose, and which would contradict statements made by him on which the other party to his knowledge is relying, held an element of fraud.—Stotts v. Fairfield, Iowa, 145 N. W. 61.

26.——Consideration.—Where, after the execution of a contract for the sale of land, the purchaser complained of his bargain being a hard one, and asked that he be allowed to have the rents of the property until the closing of the transaction, to which the seller assented, the agreement was without consideration and not enforceable.—Bonzer v. Garrett, Tex., 162 S. W. 934.

27. **Corporations** — Charitable Bequest.—A bequest to a foreign corporation capable of taking, for the general benefit of a religious denomination, held not violative of statute or public policy.—Osenton v. Elliott, W. Va., 80 S. E. 764.

28.——Directors.—Directors of a private business corporation owe a duty of caring for the property and of managing its affairs honestly, and if they violate such duty they may be compelled to make restitution.—United Zinc Cos. v. Harwood, Mass., 103 N. E. 1037.

29.——Liability of Directors.—Officers and directors of a corporation, though having falsely stated the amount of capital paid in, in the annual statement for 1909, held not personally liable for a corporate debt not created until after the annual statement for 1910 was filed which correctly stated the amount of capital paid in.—Felker v. James, Ark., 162 S. W. 776.

30.——Notice.—One who takes the check of a corporation in payment of the personal obligation of an officer is charged with notice of the account on which the check is drawn, and the corporation may recover from him if its funds are misapplied by its officer in drawing the check and it finally suffers loss thereby.—St. Louis Charcoal Co. v. Moore, Mo., 162 S. W. 745.

31.——Sale of Stock.—Persons to whom corporate stock was transferred by the managing head of a firm without consideration and in fraud of the rights of the firm creditors cannot claim as bona fide purchasers as against such creditors.—Breyfogle v. Bowman, Ky., 162 S. W. 787.

32. **Criminal Law**—Injunction.—Where one subject to a criminal ordinance secures a temporary injunction, and the injunction is dissolved upon final hearing, the case being decided against him, the injunction affords no protection from prosecution for violation of the ordinance during its pendency.—Ray v. City of Belton, Tex., 162 S. W. 1015.

33. **Death**—Proximate Cause.—In an action for negligent death in collision between vehicles, caused by the viciousness of a team of mules belonging to defendant, a corporation, an instruction authorizing recovery if the team was uncontrollable, and was known to be so by defendant, or would have been known to be so by the exercise of ordinary care, held to properly predicate liability on the negligence of the company alone.—American Express Co. v. Parcarello, Tex., 162 S. W. 926.

34. **Deeds**—Delivery.—A deed delivered to a third person, with directions to keep it until the grantor's death and then deliver it to the grantee, held to vest the grantee with absolute title upon the grantor's death and delivery of the deed to him by the depositary.—Dickson v. Miller, Minn., 145 N. W. 112.

35.——Habendum Clause.—The granting clause need not name the heirs of the grantor and grantee, especially where the habendum clause undertakes to pass a remainder.—Yeager v. Farnsworth, Iowa, 145 N. W. 87.

36. **Divorce** — Alimony.—Defendant cannot successfully move to vacate an order for payment of alimony after a certain date until he has submitted himself to the court's jurisdiction, after having left it to escape payment of

alimony, though no formal order adjudging him guilty of contempt was entered.—Bates v. Bates, 145 N. Y. Supp. 411.

37.——Detective.—The testimony of a hired detective wholly uncorroborated is not sufficient to authorize the granting of an absolute divorce.—Enders v. Enders, 145 N. Y. Supp., 450.

38. **Equity**—Ambulatory Decree.—Although a decree has been signed by the judge, it is nevertheless ambulatory until final adjournment of the term and subject to revision and modification during that period to effect the ends of justice.—Bartak v. Isvolt, Ill., 103 N. E. 967.

39.——Laches.—Where the managing partner of a firm concealed the ownership of stock from creditors, and the corporation during such time was in a highly prosperous condition, the doctrine of laches would not estop such creditors from subjecting the stock.—Breyfogle v. Bowman, Ky., 162 S. W. 787.

40. **Evidence**—Mailing Letter.—A letter deposited in the mails, postage paid, and properly addressed, will be presumed to have reached its destination.—Ruder v. National Council Knights and Ladies of Security, Minn., 145 N. W. 118.

41.——Non-Expert.—A non-expert may not give his opinion as to testator's mental capacity, in the absence of a showing that he had adequate knowledge and was qualified to express such an opinion.—Whisner v. Whisner, Md., 89 Atl. 393.

42.——Presumption.—A "presumption of fact" is an argument which infers a fact otherwise doubtful from a fact which is proved, and hence must rest on a fact already in proof.—Fadden v. McKinney, Vt., 89 Atl. 351.

43. **Execution**—Exempt Property.—A creditor may subject to the payment of his debt any unexempt property of the debtor, and if the creditor subjects property of the debtor to the payment of his debt in part, he may again subject it in satisfaction of the unpaid part of the debt if the debtor subsequently becomes the owner of the same property.—Breyfogle v. Bowman, Ky., 162 S. W. 787.

44. **Executors and Administrators**—Suit By.—Although the proper form of action on a cause arising out of the administration of an estate is by the personal representative individually, barring his right or title on his letters testamentary, yet he may sue either individually or in his representative capacity.—Leavitt v. Jas. F. Scholes Co., N. Y., 103 N. E. 965.

45. **Fixtures**—Intention.—The test for determining whether fixtures retain their character of personalty after annexation is the intention and consent of the owner of the realty, and they become a part of the realty in the absence of agreement by such owner that they shall remain chattels.—Crocker-Wheeler Co. v. Genesee Recreation Co., 145 N. Y. Supp. 477.

46. **Garnishment**—Remittitur.—A judgment which had been affirmed on condition that plaintiff file a remittitur was not, before a motion for rehearing was overruled, final so as to be subject to garnishment.—Dodson v. Warren Hardware Co., Tex., 162 S. W. 952.

47. **Habeas Corpus**—Fugitive from Justice.—In determining the judicial question whether a fugitive from justice has been lawfully demanded from the asylum state, in a proceeding for his discharge on habeas corpus, the court cannot take into consideration the question whether or not he will be accorded a fair trial in the demanding state.—United States ex rel. Brown v. Cooke, C. C. A., 209 Fed. 607.

48. **Homestead** — Abandonment.—Where the husband, as head of the family, acting in good faith, voluntarily abandons the land upon which he lives, it loses its homestead character.—Blatchley v. Dakota Land & Cattle Co., N. D., 145 N. W. 95.

49.——Partition Suit.—The court, in a partition suit by the children of a deceased husband and his surviving wife, must set aside the homestead for the use of the wife and her minor children.—Meyers v. Riley, Tex., 162 S. W. 355.

50. **Husband and Wife**—Community Estate.—Property belonged to a community estate, though the husband was a mere settler under a pre-emption claim, and occupancy had not been completed at the death of his wife.—Adams v. West Lumber Co., Tex., 162 S. W. 974.

51.——Renewal Note.—That a note executed by a married woman to a bank was several times renewed and the note sued on was given after she became sole for a balance of the debt did not prevent her from urging any defense against the latter which she could have raised against the original note.—First Nat. Bank v. Bertoli, Vt., 89 Atl. 309.

52. **Injunction**—Negative Covenant.—Equity cannot interfere by injunction to prevent the breach of a negative covenant, unless it appears that the complainant has no adequate remedy at law.—Lanston Monotype Mach. Co. v. Times-Dispatch Co., Va., 80 S. E. 736.

53.——Ordinance.—Equity will restrain the enforcement of a void criminal ordinance where its enforcement will work an irreparable injury to property for which complainant has no adequate remedy at law.—Ray v. City of Belton, Tex., 162 S. W. 1015.

54. **Insurance**—Notice of Injury.—Failure to give notice of injury within ten days was not waived by insurer's denial of liability on another ground without referring to the failure to give such notice.—Smith v. Arkansas Nat. Ins. Co., Ark., 162 S. W. 772.

55.——Obvious Risk.—One injured while attempting to cross a railroad track immediately in front of a rapidly approaching train exposes himself to "obvious risk of injury or obvious danger," within an exception in a policy of accident insurance.—Combs v. Colonial Casualty Co., W. Va., 80 S. E. 779.

56. **Landlord and Tenant**—Estoppel.—The mere execution of a lease under which the lessee does not take possession does not estop him from denying the lessor's title.—William James Sons Co. v. Hutchinson, W. Va., 80 S. E. 768.

57.——Waiver.—Where a lessor, with knowledge of a lessee's breach of a restriction of an assignment, permits the assignee to remain in possession and accepts subsequently accruing rents from him, the breach is waived.—Kanawha-Gauley Coal & Coke Co. v. Sharp, W. Va., 80 S. E. 781.

58. **Larceny** — Asportation.—Where defendant, having the custody of an animal belonging to another, went to a field, pointed it out, and sold it to a third person, who in his absence took it from the field and put it in his own pasture, defendant was not guilty of a felonious asportation.—Ridgell v. State, Ark., 162 S. W. 773.

59. **Master and Servant**—Fire Escapes.—Labor Law, requiring fire escapes on factories three stories high, is mandatory, and failure to comply resulting in death of an employe is actionable negligence.—Amberg v. Kinley, 145 N. Y. Supp. 394.

60.——Independent Contractor.—Where plaintiff agreed to remove a water tank for defendant for a certain sum, and selected his own appliances and employed his own assistants in doing the work, he was an "independent contractor" and not a servant.—Wells v. W. G. Duncan Coal Co., Ky., 162 S. W. 821.

61. **Mortgages**—Power of Sale.—It is the duty of one acting under a power of sale to use that reasonable degree of effort and diligence to protect the interests of the mortgagor, the owner of the equity of redemption, and junior lienors, to the observance of which he is bound by the obligation of good faith.—Bon v. Graves, Mass., 103 N. E. 1023.

62. **Municipal Corporations**—Agency.—A municipality, like a private corporation, is liable for the acts of its agents only when they are acting within the scope of their employment.—Bigelow v. City of Springfield, Mo., 162 S. W. 750.

63.——Shade Trees.—A telephone company is liable to a property owner for the destruction

of shade trees, located in the parkway between the sidewalk and street, in placing its wires and poles, notwithstanding the facts that it had the right to erect the poles in the place it did.—Rienhoff v. Springfield Gas & Electric Co., Mo., 162 S. W. 761.

64. **Navigable Waters**—Riparian Owners.—The meandering of a stream under the authority of the government, though conclusive of its navigability so far as the rights of riparian owners are concerned, does not constitute such line a boundary line in a strict and conclusive sense, and the riparian owners have such rights of ownership beyond such line as result from accretion.—State v. Livingston, Iowa, 145 N. W. 91.

65. **Negligence**—Licensee.—A "licensee' is a person who is neither a passenger, servant, or trespasser, and does not stand in any contractual relation with the owner of premises, and who is permitted to go thereon for his own interest, convenience, or gratification.—Patten v. Bartlett, Me., 89 Atl. 375.

66.——Manufacturer.—Where a manufacturer of automobiles made no examination of wheels purchased from a reputable dealer other than to give the machine a road test, it was guilty of negligence; it being obvious that a defective wheel might cause serious injuries, and that the defects might, by proper inspection, be discovered.—MacPherson v. Buick Motor Co., 145 N. Y. Supp. 462.

67.——Proximate Cause.—In an action against a landowner for the death of a child of six years, drowned in an uninclosed pond, the fact that the child was chasing a chicken on the bank of the pond, where he and his brother had been fishing, does not establish any intervening cause, freeing defendant from liability.—Thomas v. Anthony, Ill., 103 N. E. 974.

68. **Notice**—Public Records.—Public records are only constructive notice of what one would discover by examining the recorded instruments, and not of what he might ascertain by following an inquiry suggested by inspecting them.—Adams v. West Lumber Co., Tex., 162 S. W. 974.

69. **Nuisance** — Legislative Declaration.—That which is not in fact a nuisance or injurious to public health cannot be made so by a declaration of the Legislature or a city council.—Ray v. City of Belton, Tex., 162 S. W. 1015.

70. **Partnership**—Good Faith.—Where two persons occupy confidential relations toward each other, as where one partner has the assets of the firm and is managing partner, he will not be allowed to take advantage of his position to defraud the other.—Breyfogle v. Bowman, Ky., 162 S. W. 787.

71. **Principal and Agent**—Agent's Liability.—A person who performs services at the request of an agent who fails to disclose his principal may recover from the agent, though he may have had reason to suspect the agency.—Curtis v. Miller, W. Va., 80 S. E. 774.

72.——Good Faith.—An agent who fails to disclose any fact which would naturally influence his employer's conduct or acts adversely to his employer is guilty of a fraud upon him, so as to forfeit his right to compensation.—Moore v. Kelley, Tex., 162 S. W. 1034.

73.——Proof of Agency.—The fact of agency cannot be shown by the mere acts and declarations of the alleged agent.—First Nat. Bank v. Bertoli, Vt., 89 Atl. 359.

74.——Ratification.—Where defendant accepted the fruits of a sale negotiated by another person, he must be deemed to have adopted the methods employed by such person in the sale and whether innocent or not, if such person was guilty of fraud, defendant was jointly guilty.—Green v. Waddington, N. Y., 103 N. E. 964.

75. **Property**—Board of Trade.—Membership in a board of trade is property.—In re Personal Property Tax in St. Louis County, 1912, Minn., 145 N. W. 108.

76. **Sales**—Assignment.—An assignment of an account for merchandise sold, even if it attempts to do so, cannot operate as a conveyance of the merchandise, since the sale producing the account devested the assignor's title.—In re Cotton Manufacturers' Sales Co., U. S. D. C., 209 Fed. 629.

77. **Specific Performance**—Husband and Wife.—In an action for specific performance of a contract for the conveyance of land executed by a married man, the court cannot compel the wife of the grantor to join in the conveyance where she was not a party to the contract.—Bartak v. Isvolt, Ill., 103 N. E. 967.

78. **Telegraphs and Telephones**—Free Delivery Limits.—Where a telegraph company establishes free delivery limits, the burden rests on it to ascertain whether the addressee of a message resides within the limits, and if necessary, make demand for the requisite fee for delivery beyond the limits.—Western Union Telegraph Co. v. White, Tex., 162 S. W. 905.

79.——Mental Suffering.—A telegraph company is liable for damages from mental suffering on the part of any person who is not referred to in a message, unless it has notice that such other person is interested in its prompt delivery.—Western Union Telegraph Co. v. Taylor, Tex., 162 S. W. 999.

80.——Negligence.—A telegraph company cannot relieve itself from the liability caused by gross negligence.—Weld v. Postal Telegraph Cable Co., N. Y., 103 N. E. 957.

81. **Trusts**—Agency.—There is a presumption that an agent duly authorized to collect money for his principal has done his duty and delivered the money, and hence a judgment, charging the agent's estate with a constructive trust on the theory that he had converted the money, cannot be sustained, in the absence of evidence to that effect.—Swan v. Price, Tex., 162 S. W. 994.

82.——Husband and Wife.—Where plaintiff's deceased husband spent her money which he held as agent and for which he was liable to account, plaintiff has only a legal claim against his estate, where it is not shown that the money went into any property held by the husband at his decease.—Wisdom v. Wisdom, Wis., 145 N. W. 126.

83. **Usury**—Payments.—Payments made upon a contract affected with usury are applied by law as payments upon the principal, even though paid and received as interest.—Cotton v. Beatty, Tex., 162 S. W. 1007.

84. **Waters and Water Courses**—Act of God.—The exception to the general rule that an act of God will not excuse nonperformance of a contract, which excuses performance where it depends upon the continued existence of a particular thing or person which ceases to exist, would not apply to excuse nonperformance of a contract to furnish water for irrigation prevented by a drought stopping the usual water supply; the contract providing for damages for failure to furnish water.—Northern Irr. Co. v. Dodd, Tex., 162 S. W. 946.

85. **Wills**—Alterations.—Where words in a will are stricken out, in the absence of evidence to the contrary, it will be presumed that they were stricken out by the testator himself.—Wilkes' Adm'r v. Wilkes, Va., 80 S. E. 745.

86.——Contest.—Compromise agreement between proponent's representatives and group of will contestants held not to regulate the rights of each group, as among themselves, or to abrogate the contracts previously made by the contestants, adjusting the question of expenses, and hence there was no trust impressed on the estate in favor of one who had incurred expenses on behalf of the contestants.—Coram v. Davis, Mass., 103 N. E. 1027.

87.——Probate.—Attempts to defeat the probate of unwelcome wills by a family arrangement connived at by attesting witnesses are contrary to public policy and should be frustrated in a court of probate if possible.—In re Solomon's Estate, 145 N. Y. Supp. 528.

88.——Revocation.—Where a will once in testator's possession cannot be found at his death, or where it remains in his possession until his death, and is then found among his papers, with erasures, cancellations, or tearings, the presumption is that he destroyed or canceled it animo revocandi.—Burton v. Wylde, Ill., 103 N. E. 976.

89.——Undue Influence.—Unless the influence which the law denounces as undue influence was effective at the immediate time of making a will, the will cannot be said to be a product of that influence.—Thomas v. Cortland, Md., 89 Atl. 414.